78-1889

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1978

LAWRENCE BUTLER, RON JACKSON, CHARLES JAMES, MONROE JENKINS, ERNEST LEWIS, JAMES NASH and ESTATE OF NATHAN NASH, DECEASED,

Petitioners,

vs.

GOLDBLATT BROS., INC., THOMAS MARSH, ANDRE WALKER and DENNIS McFARLAND,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT OF THE CASE

A. Nature Of The Case

1. Complaint

This action as brought by Petitioners on Counts I and III of a four count amended complaint charged Respondents and certain police officers of the City of Chicago with:

a) acting in violation of 42 U.S.C. § 1983 under color of law by falsely arresting and imprisoning Petitioners and depriving them of their rights, privileges and im-

munities secured by the Constitution and laws of the State of Illinois (Count I); and

b) conspiring to and effectuating the false arrest and imprisonment of Petitioners in violation of Illinois common law (Count III). Jurisdiction of this count was claimed under principles of pendant jurisdiction.

Each Petitioner in each count claimed actual damages in the amount of $50,000 and punitive damages in the amount of $100,000.

2. Parties

At the time suit was filed, six of the seven petitioners, Lawrence Butler, Ron Jackson, Charles James, Monroe Jenkins, James Nash and Nathan Nash were and had been at pertinent times truck drivers or helpers employed by Respondent Goldblatt Bros., Inc. ("Goldblatts"). All had been or were members of a certain club known as Truckers 7 consisting of about seven Goldblatt truck drivers who met weekly at Tina's Lounge in Chicago, Illinois. These persons worked out of Goldblatts' warehouse also located in Chicago. The remaining Petitioner, Ernest Lewis, had no connection with Goldblatts but was a member of the same club.

Respondents are Goldblatts and three of its employees, Thomas Marsh, Dennis McFarland and Andre Walker. Marsh was Chief of Goldblatt's Security Division at its warehouse. McFarland and Walker were security officers acting under the direction and control of Marsh. These Respondents are hereinafter referred to as the Goldblatt defendants.

The police officers who are petitioners for a Writ of Certiorari in No. 78-1908 pending in this Court are John

McDonald, John Juriss, John Kowalski and Frank Krause. All were police officers of the City of Chicago at pertinent times. McDonald was commanding officer of Area 3, General Assignment Unit, Chicago Police Department, located at 39th and California Avenue in Chicago, Illinois ("Area 3"). Juriss was a police sergeant in that Unit, Kowalski and Krause were police investigators, all working under the direction and supervision of McDonald. These petitioners in No. 78-1908 are hereafter referred to as the police defendants.

B. Statement of Facts

On September 25, 1974 the police defendants effected a series of arrests without warrants of Petitioners as follows:

1. Petitioner Lewis, not a Goldblatt employee, was arrested by several of the police defendants on the verbal complaint of Respondent Walker shortly after Lewis on the morning of this date left the courtroom of Judge Olson in the Criminal Court Building in Chicago, Illinois. Lewis was taken to Area 3 where Walker shortly thereafter appeared and signed a written complaint against Lewis charging him with a violation of S.H.A. ch. 38 § 12-6 (a)(1). (intimidation by threat to inflict physical harm). This charge was based upon conduct of Lewis alleged by Walker to have occurred in Judge Olson's courtroom on that morning.

2. Petitioners Butler, Jackson, James Nash and Nathan Nash, all Goldblatt employees, were arrested by some of the police defendants at various times later in the day as they drove the Goldblatts trucks upon which they worked into Goldblatts' warehouse. They were then brought to Area 3 for questioning in connection with

their alleged participation in a conspiracy to assassinate Walker, a charge entirely different from that upon which Lewis had been arrested. Petitioner James Nash, also a Goldblatt employee, was arrested by a police defendant for the same reason on the street in Chicago, Illinois, where he was driving a Goldblatts truck. He was also brought to Area 3 for questioning. All Goldblatt employees were later released without any formal charge being placed against them. (R. 336) The charge of intimidation against Lewis was stricken on January 14, 14, 1975 from the criminal court docket with leave to reinstate. (Tr. 800).

The hours of the arrests on September 25, 1974 and periods of detention were (R88, p. 2):

Name of Petitioner	Time Arrested	Time Released
Lewis	11:00 a.m.	2:00 a.m. (9-26-74)
Butler	1:50 p.m.	6:05 p.m.
Jenkins	1:50 p.m.	5:15 p.m.
James	2:45 p.m.	11:05 p.m.
Nathan Nash	2:45 p.m.	11:55 p.m.
James Nash	3:30 p.m.	10:55 p.m.
Jackson	7:15 p.m.	2:00 a.m. (9-26-74)

The events leading up to this series of arrests were as follows:

June 10, 1974

Respondent Walker, a security officer of Goldblatts signed a complaint charging Jessie Green and Wayne Young, Goldblatt employees, with grand theft in violation of S.H.A., ch. 38 §16 (1)(a)(1). (Tr. 785). Walker was to appear to testify in this matter at a preliminary hearing on September 25, 1974 before Judge Olson at the

Criminal Court building located in Chicago, Illinois. At the time Young was an undercover security officer of Goldblatt's working as a helper on the truck driven by Green.* (Tr858)

Middle September, 1974 Events

Wayne Young, who was acquitted by the jury in the instant case, testified at the trial below that he had attended meeting of Truckers 7 at Tina's Lounge on *or* about September 18, 1974 at which times there were discussions among all Petitioners lead by Lewis, Green's cousin, concerning hostility towards Walker as a Goldblatt security officer and a plan to hire paid killers to murder Walker because he was to testify against Green. (Tr. 861-863, 868, 870, 871, 887, 889, 891). The plot was to be carried out on the day Walker testified and each Petitioner (including Young whose identity as an undercover agent was not then known) was to contribute $50 to pay off the killers (Tr. 865, 887, 890). Young testified he gave Lewis his contribution several days later in the presence of two men identified to him by Lewis as two reliable guys who would do the job of bumping off Walker. (Tr. 865, 883, 886, 909).** Goldblatts had found information from Young in the past to be accurate (Tr. 552). It later repaid Young the $50 allegedly given by him to Lewis (Tr. 900, 903).

Young told Walker of the plot and who was involved and Marsh was also made aware of it by both Walker and Young. (Tr. 503, 508, 515, 520-522, 540, 541, 787, 820, 888). Marsh and Walker determined to seek police protection for the latter when he testified (Tr. 514-517).

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* The information relied on by Walker when he signed the complaint against Green was furnished him by Young. (Tr. 896)

** Petitioners denied all of Young's testimony.

Walker stated below that after receiving this information but before going to the police, he received a telephone call from someone he believed to be Davis (one of the original plaintiffs in this case whose claim was rejected by the jury) that if Walker testified against Green, he would be killed. (Tr. 789, 790, 831).

September 19, 1974 Police Conference.

Respondents Marsh and Walker met with Captain McDonald and other police defendants at Area 3 on this date. (Tr 313, 314). Both Marsh and Walker were known to these police officers as Goldblatt security men who had dealt with Area 3 cargo and theft personnel before and whose information on prior occasions was found to be reliable and accurate (Tr. 355, 356, 442, 726, 748, 778).

At this meeting the police defendants were told by Marsh and Walker that the latter had received information from an informer, known by them to be reliable*, that there was a conspiracy to murder Walker on September 25, 1974 if he testified on that date against Green. (Tr 313, 315, 326, 341, 343, 344, 356, 357, 376, 521, 522, 568, 766).

Marsh and Walker told the police defendants that their only purpose in conferring with them was to solicit and obtain full time police protection for Walker on the day he was to testify in the Green case. (Tr 316-319, 356-358, 515, 533, 574, 727, 730, 825). Marsh and Walker also advised the police defendants that they were not interested in arresting any of the individuals involved (Tr 326, 574, 824, 825). They therefore did not disclose such individuals' names nor would they identify the informer for fear of

* The informer was later disclosed to the police on September 25, 1974 to be Wayne Young.

harm to him and because his value as an informer would be destroyed if his name was made known. (Tr 315, 316, 326, 350, 362, 377, 380, 533, 788, 824).

McDonald agreed to give Walker full police protection and surveillance which would cover him from the time he left his home on September 25, 1974, the day he was to testify. He assigned police defendant Sergeant Juriss to prepare a plan in this connection (Tr 319, 373, 766). Police defendants Juriss, Krause and Kowalski were part of the surveillance team which was set up and which followed Walker from his home to Judge Olson's courtroom on September 25, 1974. (Tr 322, 386, 387).

September 25, 1974, Lewis Incident.

Walker appeared in Judge Olson's courtroom at about 9:30 a.m. of September 25, 1974 and testified in the Green case preliminary hearing against Green who was held over to the Grand Jury. (Tr 384, 385, 786, 793, 794, 797, 892). Young was discharged. (Tr 385, 826, 866). Lewis, who was Green's cousin, was present in the courtroom on that date although not a party or a witness (Tr 61, 793). According to Walker's testimony at the trial below, Lewis approached him as he left the courtroom, grabbed him by the arm, turned him around and said, "Well, that's it for you." (Tr 796, 797, 833). Lewis denied this at the trial (Tr. 74). Sergeant Juriss, the only police defendant in the courtroom at the time in connection with the surveillance, testified he did not observe anything threatening to Walker's safety and later told Walker he didn't see what had happened (Tr 388, 391, 434). He also stated there could have been a time when Walker was out of his sight (Tr 428, 434).

Walker told Juriss outside the courtroom of the incident and pointed out Lewis. (Tr 390, 391). Walker said he

would sign a complaint against Lewis and did so at Area 3 later in the day. This was after Judge Olson had been consulted in the matter and has ordered that Lewis be charged with intimidation (Tr 402, 735, 39). Lewis was arrested by police defendants Juriss, and Kowalski not far from the Criminal Court Building in mid-morning on this date (Tr 390, 393, 798).

September 25, 1974. Decision to Arrest Goldblatt Employees and Extent, If Any, of the Goldblatt Defendants' Participation Therein.

Captain McDonald was advised by telephone call from Juriss at the Criminal Court Building of the Lewis incident and that there had been an overt act in Judge Olson's courtroom tending to reinforce Walker's prior information to the police defendants. (Tr 328, 330, 768, 769, 771). McDonald at that time had the impression that Juriss had witnessed the incident. (Tr 772)

On the basis of this information and after Lewis' arrest, Captain McDonald made his determination to arrest those involved and to bring them to Area 3 for questioning and he took full and sole responsibility for so doing. (Tr 325, 332, 333, 402, 768, 769). There is nothing in the record indicating that any Goldblatt Respondent directed or even suggested these arrests or had anything to do with Captain McDonald's decision. In fact, Captain McDonald claimed he did not talk to Walker or Marsh on this day before he issued the arrest orders. (Tr 323).

After Lewis was brought to Area 3, both Marsh and Walker appeared there. Walker was there to sign the intimidation complaint against Lewis. (Tr 427, 371, 403, 404). Marsh appeared because he had been told by Walker that there had been an arrest (Tr 548). He went to

Area 3, as did Respondent McFarland, making his first appearance in this case, to see if he recognized the person arrested as being any one from around the Goldblatt warehouse. (Tr 548, 553) After Marsh arrived at Area 3 he was told by Walker that Lewis was the one arrested. (Tr. 549, 550).

When Marsh and Walker were at Area 3 on this occasion, they were told by Sergeant Juriss that the police wanted to talk to all the individuals involved, none of whose names had been disclosed to the police to that time. (Tr 326, 371, 405, 426, 552-554). Marsh and Walker then agreed to furnish the names of the people of whom they were apprehensive and did so. (Tr 330, 403, 404, 778, 809). They did not know that those individuals were to be arrested (Tr 561). They also at that time gave the police the name of Wayne Young as the informant involved. (Tr 378).

After the arrest decision had been made by Captain McDonald, Sergeant Juriss asked Marsh and Walker to return to the Goldblatt warehouse to identify the various Petitioners to the police which Marsh, Walker and McFarland did. (Tr 407, 430, 553, 554, 810).

All except James Nash were thereupon taken into custody by some of the police defendants who transported them to Area 3. McFarland went with a police officer to identify James Nash who was still on the road and who was arrested at 22nd and Kedzie Avenue (Tr 620).

Marsh later returned to Area 3. (R 113, Tr 557). While at Area 3 on this occasion Marsh inquired of the police if any of Petitioners had said anything and was told they had not (Tr. 559). Marsh did not question any Petitioner (Tr 556, 557).

C. Disposition of the Case in the District Court

After the case was submitted to the jury, it returned separate verdicts for each Petitioner (except Lewis) againt certain of the police defendants and against Respondents in the amount of $5000 each on Count III of the complaint charging false arrest and imprisonment. No punitive damages were awarded.

At the same time, the jury returned a single verdict of $6630 in actual damages in favor of Lewis (not a Goldblatts employee) and against Respondents Goldblatts and Walker alone. This verdict was on the Section 1983 (civil rights) count of the complaint (Count I).

There were no other verdicts against any of the Goldblatt Respondents on Count I and none of the police officers were found liable to Lewis on either Count I or Count III. Joint and several judgments were entered on all the verdicts.

D. Disposition of the Appeal in the Seventh Circuit

Both Respondents and the police defendants appealed to the United States Court of Appeals for the Seventh Circuit which unanimously affirmed the judgments against the police officers but reversed all judgments against Respondents on Counts I and III.

Petitioners thereupon filed for rehearing or rehearing *en banc*. Respondents replied. (Respondents' Appendix, pp. 1a-7a) All members of the hearing panel, Judges Bauer, Pell and Harper, voted to deny the petition for rehearing. A majority of the active members of the Court below voted to deny rehearing *en banc*.

As noted in the Petition (pp. 7, 8), only Judges Fairchild and Swygert voted to grant rehearing *en banc*. Quite obviously then Judges Cummings, Sprecher, Tone and Woods joined Judges Bauer and Pell in finding no merit in Petitioners' contention that the original panel had overlooked or misapprehended points of law or fact. The Petition now before this Court is based on substantially the exact same arguments rejected by a 6-2 vote of the active members of the court below (See Petition, Appendix E, pp. 15a-29a).

REASON FOR DENYING THE WRIT OF CERTIORARI

The sole question for consideration by this Court at this time is whether the Petition meets any of the considerations governing review of certiorari as set forth in Rule 19 of this Court. Respondents contend that the Petition so far fails to meet those standards as to be virtually frivolous and almost not require response. In support of this contention, Respondents point to the following:

1. Petitioners charge that this court below reconsidered disputed issues of fact already resolved by the jury below and that in so doing the court below denied them "the fundamental rights of citizens to trial by jury." (Pet. 9). This nonsense is obviously a misguided attempt to masquerade Petitioners' case as if some constitutional issue is involved and thus impress this Court with its importance.

Quite patently, Petitioners had their jury trial. All the court below did was review the jury verdicts to determine if they were supported by sufficient evidence. This is, of course a traditional function of reviewing courts

when, as here, the record preserves the point. A reversal based on such review has never been conceived to raise a constitutional issue and Petitioners cite no authority to the contrary.

2. In performing its traditional function, the court below first correctly set forth the case law governing what Petitioners needed to prove in support of the two charges of the complaint. It then, as is obvious from opinion below, tested Petitioners' evidence in the light of its search of the entire record to see if that evidence was sufficient in any way to establish that which Petitioners were required to prove as to each charge against Respondents.* It concluded that it did not.

Unlike *Tennant* v. *Peoria and Pekin Union Railway Co.*, 321 U.S. 29 (1944), relied on by Petitioners, there is no indication in the opinion below that the court below searched the record for conflicting evidence or that it weighed Petitioners' evidence against other evidence or

---

* Its search is shown by the following excerpts from the opinion below:

> "In the case at hand, the jury returned a verdict against Goldblatts on the six employees' state law claim of false arrest. *The record discloses,* however, that Goldblatt's did not in way detain the employees nor did it sign a complaint against them [It did not] or direct the officers to arrest them. Rather, *the evidence* suggests that Goldblatt's did nothing more than give information to the police, who were free to decide for themselves whether or not the employees should be arrested." (Opinion below, Pet. App. p. 6a). Emphasis supplied.
>
> "In applying this principle to the instant case, *we are again unable to find in the record* any significant evidence to suggest that Goldblatts did anything more than supply information to police officers . . . ." (Opinion below, Pet. App. p. 7a). Emphasis supplied.

made any determinations as to the credibility of witnesses or did not give all reasonable intendments to Petitioners' proof.

Nor is it true that the court below ignored any of Petitioners' evidence as Petitioners state here. This charge also was made against the court below in Petitioners' application for rehearing and rehearing *en banc* in which Petitioners' detailed evidence alleged to have been ignored.* (Pet. App. 15a-29a). That application including all the evidence therein set forth was considered and denied. In short, Petitioners make no showing of any conflict in cases or of any reason why this court should exercise its power of supervision over the court below.

3. This court's attention is respectfully called to the fact that all of Petitioners (with the exception of Lewis) won judgments of $5000 each in the trial court against both Respondents and the police defendants. The courts below reversed only as to Respondents and affirmed the judgments as to the judgments as to the police defendants. As noted above, those judgments are presently the subject of a Petition for certiorari filed here by the police defendants in No. 78-1908.

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* In the court below, Respondents contended that Petitioners' application for rehearing and rehearing *en banc* charging the hearing panel of that court with ignoring facts of record was so scandalous as to be stricken (Resp. App. pp. 1a-7a).

It should be noted that the hearing panel affirmed Petitioners' judgments against the police defendants. Petitioners, in their brief, in opposition to the police defendants' Petition for certiorari (No. 78-1908) take an entirely different view of the panel insofar as it reviewed the evidence and law in that connection.

Unless this court grants certiorari in No. 78-1908 and thereafter reverses on the merits, Petitioners will be entitled to recover on their judgments and will have suffered no loss by reason of the reversal by the court below of the judgments against Respondents.

CONCLUSION

For the foregoing reasons Respondents respectfully submit that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

LAWRENCE BUTLER, et al.,
Plaintiffs-Appellees,

vs.

GOLDBLATT BROS., INC., et al., and
JOHN McDONALD, et al.,
Defendants-Appellants.

U.S.C.A. Nos. 77-2043, 77-2044, 77-2074, 77-2149
CONSOLIDATED

Appeal from the U.S. District Court for the Northern District of Illinois, Eastern Division.
No. 74 C 3000
Judge Bernard M. Decker, presiding.

GOLDBLATT-APPELLANTS' ANSWER TO PETITION FOR REHEARING OR REHEARING EN BANC

The old adage that "hell hath no fury like a woman scorned" is belied by plaintiffs-appellees' Petition for Rehearing or Rehearing *En Banc* which scarcely conceals even greater anger. Apparently outraged by this Court's *unanimous decision* reversing judgments in the court below against the Goldblatt appellants, plaintiffs-appellees recklessly, but without substantiation, in effect accuse Judges Pell, Bauer and Harper each of *ignoring* facts of record and relying entirely on appellants' version of the evidence below. (Petition 2, 3).

Furthermore, the panel is accused of reliance on inapposite cases* (Petition 3, 4) in order to justify its opinion. We respectfully leave the Court to draw its own inferences from these charges.**

Compounding this effrontery is the effort by plaintiffs-appellees to obtain a rehearing *En Banc* unless the panel itself unlikely agrees to a rehearing and thus acknowledges the accuracy of the accusation against it. Hearings *En Banc* are not favored and are not ordered "except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decision or (2) when the proceeding involves a question of 'exceptional importance'." F.R.A.P. 35(a).

Plaintiffs-appellees do not contend that rehearing *En Banc* is necessary here for either of these reasons. Instead they claim that the panel has committed "*an unwarranted intrusion upon* the sanctity of the jury and the discretion of the trial judge" (emphasis supplied); (Petition 3), and that "this court's reliance on facts argued consideration." Plaintiffs-appellees' basis for requires consideration." Plaintiffs-appellees' basis for rehearing *En Banc* is thus shown to be their intemperate criticisms directed to *how* the panel performed its judicial duty of considering and disposing of the appeal and is not

* *Morris* v. *Faulkner*, 46 Ill. App.3d 625 (1977); *Middleton* v. *Kroger*, 38 Ill. App.3d 295 (1976).

** F.R.A.P. 40(a) requires that a petition for rehearing should state with particularity the points of law or fact which in the opinion of the petitioner the court "has overlooked or misapprehended." Since it is presumed that counsel for plaintiffs-appellees are familiar with this Rule, their election to charge in their overlong petition (See F.R.A.P. 40(b)) that the Court "ignored vital facts" rather than "overlooked or misapprehended" them must have been deliberate. Since "ignore" is defined as "to disregard deliberately; pay no attention to; refuse to consider", Webster's New World Dictionary, College Edition, it appears that plaintiffs-appellees are really charging the panel with judicial impropriety.

directed to any substantive or procedural question of any exceptional importance involved in the case itself.* The application (more properly a suggestion) for rehearing *En Banc* can thus be construed only as an insolent attempt to submit the panel to some unauthorized and unwarranted supervision by the full Court over the performance by the panel of its judicial functions.

Plaintiffs-appellees' petition really amounts to a berating of the panel for its alleged failure to adopt plaintiffs-appellees' theories advanced in their Brief and in argument in this Court. In essence it is merely a reargument of everything previously presented. On its face, the petition is scandalous and impertinent and ought to be stricken. Nevertheless, the Goldblatt-appellants reply.

I.

The authorities, including those said by plaintiffs-appellees to be inapposite** lay down the following relevant principles to be applied in false arrest and imprisonment cases:

> 1. The act of giving information to police officers upon which they act is insufficient of itself to constitute participation in an arrest. *Odorizzi* v. *A.O. Smith*, 452 F.2d 229, 231, 232; *Steuber* v. *Admiral Corporation*, 171 F.2d 777, 780.

* It appears that plaintiffs-appellees' statement as to why rehearing *En Banc* should be granted does not comply with Circuit Rule 16 requiring a concise statement at the beginning of the petition why an appeal is of exceptional importance *or* with what decision of the United States Supreme Court this court, or another court of appeals, the panel decision is claimed to be in conflict.

** The word "inapposite" is often loosely used, as here, by brief writers. It means "not pertinent." It does not mean that a rule of law set forth in a case has no pertinency to another case simply because the facts are not entirely similar; if the opposite was true, there would be virtually no precedents and no stare decisis.

2. No liability for false arrest arises as to those furnishing such information even though erroneous or false, if the police in making the arrest are shown to be free to take any action they choose. Under such circumstances, the giving of the information is not deemed to be either a direction to the police or a procurement of the arrest. *Morris* v. *Faulkner,* 46 Ill. App.3d 625, *Armstead* v. *Escobedo,* 488 F.2d 509.

3. No liability for false arrest arises where a defendant did not sign a complaint, did not request police officers to make the arrest and did not detain the person arrested. *Middleton* v. *Kroger Co.,* 38 Ill. App. 3d 295.

All of these rules were quite plainly pertinent and applicable to the hearing on the Goldblatt-appellants participation in the complained of arrests. Any assertion to the contrary is vacuous. In fact, plaintiffs-appellees in their Brief (pp. 60, 61) relied on cases going to those issues and now repeat, *ad nauseam,* the same arguments in their petition. In any event, the Goldblatt-appellants briefed *Middleton, Morris, Armstead, Odorizzi* and *Steuber* (Opening Brief, pp. 23-25) and drew no adverse response, comment or criticism in plaintiffs-appellees' Brief as to their pertinency. Plaintiffs-appellees' belated mistaken response to now advise the Court should receive short shrift. F.R.A.P. 40 was not promulgated as a "crutch for dilatory counsel." *United States* v. *Doe,* 445 F.2d 753 (1972).

II.

Despite plaintiffs-appellees' charge to the contrary, the Opinion of this Court evidences quite clearly that it extensively examined the record in this appeal. In fact, the Court says that it did so. Thus it states:

> *"The record discloses,* however, that Goldblatt's did not in any way detain the employees, nor did it sign a complaint against them or direct the officers to arrest them. Rather, the evidence suggests that Goldblatt's did nothing more than give information to the police who were free to decide for themselves whether or not the employees should be arrested." (Emphasis supplied), Opinion p. 6.

And,

> "In applying these principles to the instant case, *we are unable to find in the record any significant evidence. . . .*" (Emphasis supplied), Opinion p. 7.

Plaintiffs-appellees devote most of their petition to a fragmentation of some of the evidence and assert the jury might have drawn certain inferences therefrom indicating that the Goldblatt-appellants conceived a plot to deceive the police-appellants to arrest plaintiffs-appellees, and thereby participated and procured the arrests. Virtually all of this fragmented evidence was set out in their Brief and the inferences claimed to flow therefrom vigorously argued (See plaintiffs-appellees' Brief, pp. 4-7, 13-16, 17-19, 23, 24, 28, 46, 47, 50, 51, 53-57, 61, 62-64). In view of the extensiveness of plaintiffs-appellees' arguments in the above respects, it is impossible to believe that they were overlooked unless, unthinkably, the Court did not read the Brief. It is also impossible to believe that those arguments, having been read, would be deliberately disregarded by each of the three judges of this Court in order to reverse.

III.

In any event, plaintiffs-appellees' contentions are meritless and depend upon the premise that the jury could have inferred that Walker's story to the police of receiving information from an informer (Young) of a conspiracy to murder him was completely fabricated.* The Goldblatt-appellants have already demonstrated the falsity of this premise. (Reply Brief, pp. 9, 10).

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* Plaintiffs-appellees did not deem this theory important enough to argue to the jury.

With respect to the Lewis arrest, plaintiffs-appellees claim the panel ignored the fact that "prior to the arrest of Lewis and any of the other Petitioners, Walker was asked "if he would sign a complaint and he indicated he could'" and did so. (Petition 2). By this rather artful juxtaposition of words, plaintiffs-appellees may be attempting to mislead the Court into believing Walker undertook to sign a complaint against not only Lewis but also the Goldblatt employees. He did not. In any event, the evidence indicated that Lewis would have been arrested whether or not Walker agreed to sign a complaint. In fact, plaintiffs-appellees' counsel developed that the decision to arrest Lewis was "spontaneous" and that Officer Gerl would have arrested him "on his own" on the basis of the information given him by Walker (Tr. 449, 550).

It also appears that the question of whether or not Walker said he would sign a complaint is irrelevant in the face of *Grow* v. *Fisher,* 523 F.2d 875, 879 in which this Court in a civil rights action under § 1983 stated, p. 879:

> "The mere fact that the individual defendants were complainants and witnesses in an action prosecuted under color of law does not make their complaining or testifying other than what it was, i.e., the action of private persons not acting under color of law."

This case was set forth and argued in the Goldblatt-appellants Opening Brief, p. 25 and drew no response from plaintiffs-appellees in there Reply Brief. In fact, plaintiffs-appellees made no point at all in their Reply of Walker's alleged willingness to sign a complaint nor did they argue it to the jury.

IV.

In closing, the Goldblatt-appellants respectfuflly point out that the court in reversing the judgments below against them did not deem it necessary to reach many

of the other points relied on by those appellants to reverse even if the evidence were sufficient to go to the jury. Those points among others, raised questions as to:

1) The effect of the acquittal of the police appellants on the civil rights and false arrest counts of the complaint involving Lewis. (Opening Brief, pp. 16-21)

2) The inadequacy of the Trial Court's instructions. (Opening Brief, pp. 21-27)

In addition, questions were raised as to the excessiveness of its damages and attorney fees awarded below.

In the unlikely event that plaintiffs-appellees petition be granted, all of these matters again arise and should be considered by the panel or full Court if rehearing *en banc* is required.

CONCLUSION

An examination of plaintiffs-appellees' petition reveals that they argued virtually all of their contentions before and now seek re-argument simply because they lost. In order to achieve this purpose, they have deliberately made unwarranted charges against the panel. The petition should be stricken or denied.

Respectfully submitted,

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by their attorney

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